80-938

Supreme Court U.S.
FILED
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MICHAEL RODAK, JR., CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

**BURBANK ANTI-NOISE GROUP,
NORTH HOLLYWOOD HOMEOWNERS ASSN.,
SHERMAN OAKS HOMEOWNERS ASSN.,
STUDIO CITY RESIDENTS ASSN.,
SUN VALLEY HOMEOWNERS ASSN., and
VAN NUYS HOMEOWNERS ASSN.,**

Petitioners,

vs.

**NEIL E. GOLDSCHMIDT,
FEDERAL AVIATION ADMINISTRATION,
LANGHORNE M. BOND, STATE OF CALIFORNIA,
LOCKHEED AIR TERMINAL, INC., and
HOLLYWOOD-BURBANK AIRPORT AUTHORITY,**

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. When the federal agency charged with applying the National Environmental Policy Act (NEPA) to aviation determines that an airport project does require an Environmental Impact Statement (EIS), and no one files suit to contest that determination, does a District Court (in the midst of a proceeding challenging the sufficiency of the EIS which was prepared) have jurisidciton to decide that an EIS was not required?

2. When an EIS is prepared, and relied on by the Secretary of Transportation, the FAA, and the public, can a District Court hold that none was needed, and grant summary judgment to a challenge of the EIS's adequacy?

3. Is an EIS required (as the FAA's regulations declare) when the FAA approves the location of an airport?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

BURBANK ANTI-NOISE GROUP, NORTH HOLLYWOOD HOMEOWNERS ASSN., SHERMAN OAKS HOMEOWNERS ASSN., STUDIO CITY RESIDENTS ASSN., SUN VALLEY HOMEOWNERS ASSN., and VAN NUYS HOMEOWNERS ASSN.,

Petitioners,

vs.

NEIL E. GOLDSCHMIDT, FEDERAL AVIATION ADMINISTRATION, LANGHORNE M. BOND, STATE OF CALIFORNIA, LOCKHEED AIR TERMINAL, INC., and HOLLYWOOD-BURBANK AIRPORT AUTHORITY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioning homeowners associations respectfully pray that a Writ of Certiorari issue to review a judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals (App. C) is reported as Burbank Anti-Noise Group v. Goldschmidt (9th Cir. 1980) 623 F.2d 115.

JURISDICTION

The judgment of the Court of Appeals was filed and entered on July 14, 1980. A timely Petition for Rehearing was denied September 8, 1980 (App. D).

A copy of the District Court's judgment is App. A. A Reporter's Transcript of the District Court's comments on May 8, 1978, which the Court said explained the grounds for the judgment, is App. B.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The following pertinent statutes and regulations are reproduced in App. E:

FAA, Policies and Procedures for Considering Environmental Impacts, App. 2, §3;

49 U.S.C. § 1716(c)(4);

42 U.S.C. § 4332.

STATEMENT OF THE CASE

This is an appeal from a summary judgment which held that an EIS was not necessary when the FAA approved the location of the Hollywood-Burbank Airport, and then financed the sale of the airport from private to public ownership.

The case began when Lockheed Air Terminal, Inc. decided that it could not operate the Hollywood-Burbank Airport

in conformity with California noise regulations. As the FAA's decision paper expressed it (AR 15-16): [1]

> "The proposed acquisition of Hollywood-Burbank Airport is the direct result of the announced intention of Lockheed Air Terminal, Inc., the present owner/operator, to close the airport by December 31, 1977, if no action is taken by any governmental body to acquire and operate the facility. The decision to close the airport was based on a determination by Lockheed that maintenance of the facility was no longer viable because: (1) Lockheed could not comply with the California noise regulations, (2) the airport did not generate sufficient return for its value and (3) continued operation could result in exposure to civil litigation."

As a result of Lockheed's threat to close the airport, the cities of Burbank, Glendale and Pasadena entered into a joint powers agreement and formed the

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1/ The Administrative Record, which was received in evidence by the District Court (RT 5) is designated AR. The Clerk's Record is designated CR.

Hollywood-Burbank Airport Authority for the purpose of acquiring and operating the airport.

The FAA decided an EIS was required.

An EIS was prepared.

The project being examined is described in the EIS as having two facets (AR 31):

- Federal financing to assist in the acquisition of the Hollywood-Burbank Airport; and

- "The proposed action also includes airport location approval since this project is the first Federal action involving the Airport and Airway Development Act of 1970 at Hollywood-Burbank Airport."

Thus, the purpose of the EIS was to explain the consequences of the transfer of the airport from Lockheed to the newly-created Hollywood-Burbank Airport

Authority, as well as the consequences of operating a jet airport at that location (for the "airport location approval" part of the project).

The EIS was relied on by the Secretary of Transportation in approving the location of the airport and the federal funding of the purchase from Lockheed.

A detailed discussion of the EIS is not presented in this Petition, as the Court of Appeals refused to examine the substance of the EIS. It suffices at this point to note the following about the EIS:

- It is voluminous, containing 1576 pages.

- Its financial analysis was prepared on the assumption that revenue would be required to

service $12 million worth of bonds (AR 2316; CR 422-424). It was later learned that it would be necessary to service a bond issue twice that size (CR 426). No new analysis was prepared to evaluate this reality.

- It is not a coherent, much less unified, document. The so-called "Final EIS" is contained in 3 volumes. The first volume contains a summary of the EIS, more than a hundred pages of miscellaneous written criticisms of the draft EIS (followed — individually — by responses to the criticisms), and a number of other documents. The second volume contains the draft EIS along with

17 appendices. The third volume contains more comments on the draft EIS and a summary of the public hearing on the draft EIS.

- It is not an impartial, full-disclosure document. Instead, it is a partisan rationalization of a mind which was made up in advance.

Thus, the EIS fails in its task of ensuring, in the words of Matsumoto v. Brinegar (9th Cir. 1978) 568 F.2d 1289, 1290, that even if "[t]he project when finished may be a complete blunder — NEPA insists that it be a knowledgeable blunder." (Emphasis added.)

This suit was brought by 6 home-owners' associations against the Secretary of Transportation, the Administrator of the FAA and the FAA to review their

compliance with NEPA in preparation of the EIS (CR 1).[2/] The State of California, Lockheed, and the Hollywood-Burbank Airport Authority were permitted to intervene as defendants.

The District Court granted summary judgment in favor of the defendants and intervenors, holding that no EIS was required for this project and, if one were, the EIS which was prepared was adequate (RT 8, 13; CR 963).

In granting summary judgment for the Defendants, the District Court overlooked half the purpose of the EIS: the Court looked only at the transfer of ownership, not the airport location approval (RT 9).

2/ The District Court's jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1337, NEPA (42 U.S.C. § 4321 et seq.) and the Airport and Airway Development Act (49 U.S.C. § 1701 et seq.).

The Court of Appeals affirmed. That court likewise ignored the airport location approval. It also disregarded the fact that the FAA — the federal agency charged with deciding whether an EIS is required — decided that an EIS was required, prepared an EIS and relied on it.

At oral argument in the Court of Appeals, counsel for the United States candidly agreed that his agency had decided to prepare an EIS and had relied on it and urged that the EIS be evaluated on its merits.

This Court's intervention is needed to re-establish the rule that it is the agency's job to decide whether to prepare an EIS (in the absence of a proper judicial challenge). In disregarding the FAA's determination that an EIS was required, the decision below is contrary to all known authority.

1

BY OVERRULING THE FAA'S DECISION THAT AN EIS WAS REQUIRED IN THIS CASE, THE OPINION CONFLICTS WITH ALL KNOWN DECISIONS ON THIS ISSUE, INCLUDING DECISIONS OF THIS COURT

The decision whether to prepare an EIS is made by the responsible federal agency.3/

In this case, the FAA decided an EIS was necessary.

3/ E.g., First National Bank v. Richardson (7th Cir. 1973) 484 F.2d 1369, 1380; Scientists Inst. for Pub. Info., Inc. v. AEC (DC Cir. 1973) 481 F.2d 1079, 1994; Morningside Renew. Coun., Inc. v. AEC (2d Cir. 1973) 482 F.2d 234, 238; Image of Gr. San Antonio v. Brown (5th Cir. 1978) 570 F.2d 517, 522; Committee for Auto Responsibility v. Solomon (DC Cir. 1979) 603 F.2d 992, 1002; Hanly v. Kleindienst (2nd Cir. 1972) 471 F.2d 823, 838; Minnesota Pub. Int. Res. Group v. Butz (8th Cir. 1974) 498 F.2d 1314, 1319; First National Bank v. Watson (D DC 1973) 363 F.Supp. 466, 472; Citizens for Reid State Park v. Laird (D Maine 1972) 336 F.Supp. 783, 789.

The courts have repeatedly refused to second-guess agency decisions on the threshhold decision whether to prepare an EIS. The following explanations are illustrative as well as persuasive.

> "Determining when to draft an impact statement for a technology development program obviously requires a reconciliation of these competing concerns. Some balance must be struck, and several factors should be weighed in the balance. How likely is the technology to prove commercially feasible, and how soon will that occur? To what extent is meaningful information presently available on the effects of application of the technology and of alternatives and their effects? To what extent are irretrievable commitments being made and options precluded as the development program progresses? How severe will be the environmental effects if the technology does prove commercially feasible?
>
> "Answers to questions like these require agency expertise, and therefore the initial and primary responsibility for striking a balance between the competing concerns must rest with the agency itself, not with the courts." (Scientists Inst., 481 F.2d at 1094; emphasis added.)

" . . . the agency's determination reflects the exercise of expertise not possessed by the court." (Hanly, 471 F.2d at 829)

This Court has expressly adopted this interpretation of NEPA. As this Court held in Kleppe v. Sierra Club (1976) 427 U.S. 390, 412:

"Respondents conceded at oral argument that to prevail they must show that petitioners have acted arbitrarily in refusing to prepare one comprehensive statement on this entire region, and we agree. Tr of Oral Arg 67. The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighing of a number of relevant factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility. Resolving these issues requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies. [citation] Absent a showing of arbitrary action, we must assume that the agencies have exercised this

discretion appropriately. (Emphasis added.) 4/

The deference to the judgment of the responsible federal agency (in the absence of palpable abuse [see City of Davis v. Coleman (9th Cir. 1975) 521 F.2d 661, 673]) is the application to NEPA of settled principles of administrative law. (E.g., Moog Indus., Inc. v. FTC [1958] 355 U.S. 411, 413; Atlantic Ref. Co. v. FTC [1965] 381 U.S. 357, 367.)

Whether the need for preparation of an EIS is an issue before the courts flows from the familiar "case or

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4/ Thus, decisions cited in the Court of Appeals' opinion which affirm agency decisions not to file an EIS, actually support the Homeowners. In those cases, deference was paid the expertise of the responsible federal agency. At bench, the FAA decided an EIS was needed. The same deference is due the FAA's decision here.

controversy" problem. As Mr. Chief Justice Marshall explained in Osborn v. The Bank of the United States (1824) 9 Wheat. (22 US) 738, 819:

> "[The judicial] power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States." (Emphasis added.)

If an interested party believes the responsible federal agency has abused its discretion in determining whether to prepare an EIS, he must file suit against the agency, to overturn its decision. That is the " . . . form prescribed by law . . ." However, NO ONE SUED THE FAA, SEEKING A DECLARATION THAT NO EIS WAS REQUIRED.[5/] Thus, as no

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5/ That some Appellees may have said, in affirmative defenses in the suit (continued)

one filed suit to invalidate the EIS requirement, the courts lack jurisdiction to determine that no EIS was required. When they concluded that no EIS was required, the courts below decided a bogus issue. As counsel for the FAA candidly said at oral argument in the Court of Appeal, an EIS was prepared and relied on, and should be judged on its merits, We agree.

5/ (Continued)

brought by these Homeowners, that no EIS was required, is not the equivalent of their filing suit against the FAA seeking to invalidate the EIS requirement. In the case at bench, all Appellees (including the FAA) were on the same side. No case or controversy was alleged among the Appellees.

AN EIS IS REQUIRED WHEN THE UNITED STATES GIVES AIRPORT LOCATION APPROVAL

The Court of Appeals' opinion reads as though the only purpose of the EIS was to support the decision to federally fund the transfer of ownership of the airport from Lockheed to a consortium of local governments. From that false premise, it says that mere change of ownership lacks environmental impact.

The opinion is in error.

As the decision paper of the Secretary of Transportation notes, the EIS was needed to support two federal actions:

- one was the funding of the purchase;

- the other was location approval:

"The proposed action also includes airport location

> approval since this project is the first Federal action involving the Airport and Airway Development Act of 1970 at Hollywood-Burbank Airport." (AR 31)

The opinion ignores location approval. What the Secretary did — based on the EIS — was to approve the location of an airport which has the environmental impacts shown by the EIS.[6] Those impacts are significant. Indeed, they are so significant that Lockheed bailed out of the airport operating business to avoid the litigation over the damaging impacts which it felt was inevitable.[7]

6/ This Court recently saw the type of adverse impacts when it let stand a damage judgment for emotional distress caused by airport noise (Greater Westchester Homeowners Assn. v. City of Los Angeles [1979] 26 Cal.3d 86, cert. den. __U.S.__ [Oct. 6, 1980]).

7/ "The prposed acquisition of Hollywood-Burbank Airport is the direct result of the announced

(continued)

"Location approval" is the most critical decision that can be made about an airport. How can it be said that the decision whether to approve the location of the 60th most active airport in the United States (AR 5) can be made without an EIS?

As the FAA's own rules provide:

> "3. Environmental impact statements . . . Environmental assessments should be developed along with economic and technical considerations in the facility siting

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7/ (Continued)

intention of Lockheed Air Terminal, Inc., the present owner/operator, to close the airport by December 31, 1977, if no action is taken by any governmental body to acquire and operate the facility. The decision to close the airport was based on a determination by Lockheed that maintenance of the facility was no longer viable because: (1) Lockheed could not comply with the California noise regulations, (2) the airport did not generate sufficient return for its value and (3) continued operation could result in exposure to civil litigation." (AR 15-16)

> and design. Careful consideration of the specific site and the effect of aircraft operations should never be overlooked. Where the individual location impact or the operational use of the facility indicates significant environmental impact or where significant controversy exists or is expected, an EIS should be prepared and circulated in accordance with this order." (FAA, Policies and Procedures for Considering Environmental Impacts, Appendix 2, §3), (CR 192)

Approval of the location of this airport could not be accomplished without an EIS. This is all the more so when an EIS was in fact prepared and relied on by the United States and the public.

It is possible that the Court of Appeals accepted the spurious argument of the Appellees that this issue was not raised in the District Court. This assertion is erroneous.

Much of the Homeowners District Court case addressed the impact of this airport's location on its neighbors (CR 429-477, 601-603, 618-619, 649-665).

In attempted rebuttal, the Appellees "pooh-poohed" the Homeowners' presentation, claiming that it merely described the status quo of this airport, located as it is. Or, as the State put it, " . . . the noise problem at this airport is a known quantity." (CR 716) Precisely. And what the Secretary of Transportation did was to approve the location of an airport with known, serious defects. That required an EIS.

The issue was litigated below.

An EIS was required because this site was receiving its first federal approval. The issue deserves consideration on its merits.

THE COURT OF APPEALS' OPINION PROCEEDS FROM THE FALSE PREMISE THAT THERE CAN BE NO ADVERSE ENVIRONMENTAL IMPACT

The Court of Appeals was fooled. Arguments by Lockheed and the Airport Authority led that Court to conclude (slip op., p. 4):

> "The conclusion that no EIS is required is certainly compelled in the present case since the evidence of record and applicable law show that there will be no deterioration from the current state of the environment. 1/

"1/ California Government Code Section 6546.1, which authorized the creation of the Hollywood-Burbank Airport Authority, provides:

> "In operating the airport, the separate public entity above mentioned shall not permit or authorize any activity in conjunction with the airport which results in an increase of

> the size of the noise impact area based on a community noise equivalent level of 70 decibels as established pursuant to Title 21, California Administrative Code, Chapter 2.5, Subchapter 6, and shall further comply with the future community noise equivalent levels prescribed by such title as it now exists or is hereafter amended." (Emphasis added.)

But the FAA's documents show this is not true. The Homeowners asked judicial notice of two recent documents (attached to the Petition for Rehearing as an Appendix D): a 3/25/80 letter from the Hon. John Burton, Chairman of the Government Activities and Transportation Subcommittee of the House Committee on Government Operations to the Hon. Langhorne Bond, Administrator of the FAA; and a 2/15/80 Noise Compliance Finding by the FAA (concerning this

airport), which was the subject of Congressman Burton's letter.

NOISE MEASUREMENTS SHOW THAT THERE HAS ALREADY BEEN DETERIORATION IN THE NOISE ENVIRONMENT, contrary to what the Appellees led the lower courts to believe. As Congressman Burton summed it up (at p. 2 of his letter):

> "When the proper comparison is made between the stipulated 1977 'noise impact area' and that for June 1979, a 43 acre (12%) increase is revealed as well as an overall increase of 337 acres or 28% in the total CNEL area."

In other words, the Homeowners were right when they challenged the EIS as failing to consider sufficient data more accurately reveal the impact of transferring the airport from private to public ownership. The EIS speaks as of Aug., 1977. There has been a major increase in noise impact area since then.

The FAA's current data show that the severe noise-impact area is larger by 43 acres than when the EIS was prepared. The noise has increased notwithstanding the Court of Appeals' belief that the law prevented such deterioration in the environment.

The Court of Appeals was fooled. Consideration based on the real facts seems in order.

CONCLUSION

The opinion of the Court of Appeals conflicts with all known authority by disregarding the FAA's determination that an EIS was required.

Moreover, as the Secretary of Transportation concededly relied on the EIS, that document merits consideration to determine the validity of the

Secretary's decision, even assuming arguendo that the EIS was not required. It is a mischief-making precedent which ignores the foundation of a major governmental decision. Yet that is what the opinion below establishes.

This Court's review is needed.

Respectfully submitted,

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MICHAEL M. BERGER,

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A Professional Corporation

Attorneys for the
Petitioners

APPENDIX A

E N T E R E D

MAY 9 1978

Clerk, U.S.
District Court
Central District
of California

F I L E D

MAY 8 1978

Clerk, U.S.
District Court
Central District
of California

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BURBANK ANTI-NOISE GROUP, et al, Plaintiffs, v. BROCK ADAMS, et al, Defendants.	NO. CV 77-3868-IH SUMMARY JUDGMENT

The motion of all Defendants for summary judgment, filed February 21, 1978, came before the Court for hearing this date. Counsel for all parties appeared. The Court having considered the said motion together with the Points and Authorities, affidavits and other evidence and documents filed in support

thereof and in opposition thereto, finds as follows:

(a) There is no bona fide issue of material fact tendered by Plaintiffs which would preclude the grant of summary judgment.

(b) Defendants are entitled to summary judgment as a matter of law in each of two alternative grounds.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Defendants and each of them shall have judgment against Plaintiffs. Plaintiffs shall take nothing by their action against Defendants or any of them.

2. The Clerk shall transmit a copy of this Judgment by United States mail to counsel for all parties.

3. A transcript of the proceedings in open court this date is ORDERED filed immediately upon its production.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

HONORABLE IRVING HILL, JUDGE PRESIDING

- - -

BURBANK ANTI-NOISE GROUP, etc., et al., Plaintiffs and Petitioners, vs. BROCK ADAMS, etc., et al., Defendants and Respondents.	Case No. CV 77-3868-IH
THE STATE OF CALIFORNIA, acting by and through the Department of Transportation; LOCKHEED AIR TERMINAL, INC., and HOLLYWOOD-BURBANK AIRPORT AUTHORITY, Intervenors and Defendants.	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, May 8, 1978

DON P. CRAM
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THE COURT: All right. You will be handling it, Mr. Pach?

MR. PACH: Yes, your Honor.

THE COURT: All right. Then the intervenor Lockheed Air Terminal.

MR. SIMON: Richard Simon and Phyllis Gordon.

THE COURT: And you will be handling it, Mr. Simon?

MR. SIMON: That is correct.

THE COURT: All right. The Court has before it this morning a motion on the part of all defendants for summary judgment filed under date of February 21st.

There is a great deal of evidence submitted which I will not take the time to list.

The Court, of course, has before it as part of that evidence the Environmental Impact Statement -- which everybody calls "EIS" for short -- and the entire administrative record that accompanied it.

Also in the evidence are affidavits from a number of scientists and other people. I have, of course, considered all of the evidence.

This case involves the proposed transfer to public ownership of the Hollywood-Burbank Airport, which is now privately owned. The acquiring agency, which I will call, as you have, HBAA, for short, is a joint-venture type of public body created under state law by three cities. The acquiring agency will obtain federal funds to aid its purchase

of the airport and will issue revenue bonds for the balance.

An Environmental Impact Statement, an EIS, was prepared. The same statement served also as an Environmental Impact Report, an EIR, for purposes of state law. The state law is the California Environmental Quality Act, called CEQA.

The plaintiffs in this case are a number of homeowner groups in the vicinity of the airport. They seek to enjoin the acquisition. Their basic contention is that the EIS was inadequate.

A subsidiary contention is advanced in the papers which I will deal with separately, that the provisions of the Airport and Airways Development Act, AADA, have not been complied with.

The motion presents four issues: First, since plaintiffs brought a state court action claiming inadequacy of the

EIS as an EIR and lost the case, with alternative state court judicial findings by Judge Zack that no EIR was needed and, if needed, that it was adequate, in the light of those facts are plaintiffs -- who were identical in the state case to plaintiffs here -- now barred by collateral estoppel in the instant federal court case? That is issue No. 1.

No. 2 is, was an EIS required as a matter of law.

No. 3 is, if needed, was the EIS adequate, and can the Court so determine in this summary judgment motion?

And No. 4 is the AADA matter, is summary judgment precluded because an issue of material fact may exist on the question of whether the AADA was complied with?

I am going to take up those issues in the same order as I have presented

them. And I will proceed now to discuss the issue of collateral estoppel and give you my tentative views about that.

I am persuaded that if the state court decision was final, the plaintiffs would be collaterally estopped and a summary judgment would and should be granted. But the state court action is not final. Although I find the contention ingenious, I am not persuaded by the defense contention that I should ignore the California state law requirement of a final judgment even if I had the discretion to do so under conflicts of law principles.

I say that a summary judgment would be proper if that decision was final because of the identity of the plaintiffs in the two cases and the identity of the legal questions involved.

Now, if, after considering the rest of the motion, a trial is needed in this case, a stay of this case might well be granted, if defendants request one, to see if the state court's judgment stands up on appeal. But that matter, the matter of a stay, will become important only if a trial is needed in this case, and if defendants seek any such stay.

Those are my views about the collateral estoppel point. I don't propose to take the time for any argument on that first issue at all. And, as will be seen from my remarks that are now forthcoming, it's my tentative view that the summary judgment should be granted on other issues, but not on collateral estoppel grounds. If it is so granted, if course the matter of a stay becomes moot.

I proceed to discuss the second issue now, was an EIS needed?

I am of the tentative view that the summary judgment ought to be granted on this ground, the ground that no EIS was required. One was, of course, obtained. I don't know whether it was obtained out of an abundance of caution because it arguably might be required, or because of someone's mistake of law. But whichever, it is my tentative view that obtaining an EIS does not, by estoppel or otherwise, foreclose a Court from determining if one was required under the law, or precludes the defendants from urging that none was required.

There are apparently no cases on this particular point, so logic should prevail. That is not to say that logic, would not prevail even if there were some cases; but logic, as I see it,

requires the ruling that I have indicated.

If the proposed action is not one which would require an EIS, and a court so determines, that ought to be the end of the matter, even if one was obtained and even if, arguendo, the one that was obtained is deemed to have been inadequate.

It's my tentative view that on this issue the defense contention that no EIS required, there is no disputed issue of material fact, and defendants are entitled to judgment as a matter of law.

Let me document that tentative view briefly. The action here is merely a change of ownership. It is totally clear that the airport will operate under the new ownership exactly as it operated under the old ownership in terms of any effect on the environment.

There are now a number of cases, District Court cases, which hold that a change of ownership which involves the same or essentially the same use of the land as previously had, is not within NEPA because it does not significantly affect the quality of the human environment. The New Jersey case, Borough of Fairfield v. Coleman, is very close to our case on the facts. It involved the public acquisition of a privately-owned airport which the private owner wanted to get rid of. No EIS was prepared, although federal money was to be used to aid in the acquisition of the airport by the public body.

The holding is, to me, clear and persuasive that no EIS is needed because the aim of the acquisition was the preservation of the status quo. As that judge points out, if there is to be

future new construction or expansion, an EIS would then be needed, which of course could be said in our situation too, even though a whole host of barriers have been set up to preclude any future activity of that kind in the instant case.

Other cases along the same line as Fairfield are Town of Groton v. Laird, 353 F.Supp 344, where three hundred military housing units were being sold off for the same use. And also City and County of San Francisco v. U. S., involving a proposed lease of the Hunter's Point Shipyards by the Navy to private operators for the same type of use. And there, as I recall, a summary judgment for defendants was granted.

Again, expressing my tentative views, I am not impressed with the things that plaintiffs argue as precluding summary judgment on this ground. The claim that

HBAA will be eligible for further federal and state funds if it wants to expand its size or increase its operational capacity may be true, but is also irrelevant. Any such later expansion will undoubtedly require an EIS, if it happens; but there is no expansion involved in this acquisition.

The plaintiffs make much of the fact that the FAA approval contains a clause which states that the public authority must "acquire" an 89 acre clear zone. A clear zone exists right now. The clear zone requirement is a part of the present FAA requirements on the present owners of operating this airport.

The clear zone concept is a way of guaranteeing that no structures will be built of a sufficient height on the land in question as would interfere with take-offs and landings.

The 89 acres in question now and for some time past contain only vacant land or commercial and industrial buildings. There is no residential use of any of that land. Nobody lives there. Those facts are undisputed.

The HBAA can meet the requirement of acquiring the clear zone in any one of three ways; and that is undisputed, it seems to me. Those three ways are to get the area zoned so that no offending structures can be built. The second is to acquire an easement over the 89 acres. And the third to acquire by condemnation or otherwise the fee title to the 89 acres, although nothing in the requirement of the FAA makes it necessary to get fee title.

In addition, this clear zone requirement can be met by a continued FAA waiver as exists right now with respect to one

or more structures that now exist on the property and which the FAA has determined to be non-hazardous.

It seems to me in looking at this -- and this again is tentative -- that whichever of these alternative methods are employed to meet the clear zone requirement would not involve a significant change in the environment, and there is no disputed issue of material fact about that.

Even if one postulates taking the most extreme method of getting that clear zone, getting fee title, and then leveling the industrial buildings that exist, such would not involve a significant change in the quality of the human environment.

A case which is instructive on that is a decision of Judge Swigert's up in the Northern District, Durnford v. Ruckelshaus, 3 E.L.R. 20175. There,

federal funds were going into the construction of a new fishing pier and sewerage facility; and even though a new sewerage treatment plant, an outfall project and a new pier were being built in an area where fishing was going on already, Judge Swigert held that no EIS was needed, emphasizing that what was happening was upgrading of the location without changing the existing use.

Plaintiff also argues that for one reason or another, once the public authority gets the property, it will have to expand its use of the property. Plaintiff says that operation by the HBAA will be an economic disaster and that fact will force the expanded use in order to pay off the revenue bonds.

Again, I see no disputed issue of material fact precluding summary

judgment under this contention. First of all, such expansion is affirmatively prohibited by California Government Code 6546.1 as amended in March of this year, so that no lengthening of runways is allowable and no purchase of fee title to residential property is allowable.

In addition, the Burbank City Council Resolution 17390, incorporated in the Joint Powers Agreement, prohibits capital improvements from being undertaken or even considered if they would increase the existing noise levels. It prohibits property beyond the existing boundaries of the airport being used for airport purposes except as required for safety standards.

So, plaintiffs' "iffy" argument that the law will not be observed and the airport will have to expand at some indefinite time in the future does not,

in my view, require any present EIS or preclude summary judgment on the ground that we are discussing.

Well, much more could be said. I intend, however, to stop here. I want to give each side twenty minutes to discuss the tentative judgment as thus far announced. And so that you may know what is coming, I will tell you that I tentatively propose to grant the summary judgment also on the alternative ground that if an EIS is necessary, it is adequate. And I, of course, after giving you the thinking behind that tentative judgment, will allot separate time for arguing that aspect of the matter.

Mr. Fadem, we will hear you first.

MR. FADEM: We are prepared to submit on the written papers, you Honor.

THE COURT: Very well.

The indicated judgment is in favor of defendants. Do they desire to argue the matter at all?

MR. PACH: The HBAA does not, your Honor.

THE COURT: Anybody else on the defense side?

MS. HALBREICH: No, your Honor.

MR. CONNOR: Nothing from the State of California, your Honor.

MR. SIMON: No, your Honor.

THE COURT: Do any of you on the defense side believe that anything I have expressed in terms of the tantative judgment on this ground may be incorrect legally, or needs revision, or a different emphasis?

If you do -- why don't you think that over. We will take a ten-minute recess, and then I will hear from you about that.

(Short recess.)

THE COURT: Are there any matters that any defense counsel desires to take up along the line of my last inquiry before we go on to the next point?

MR. PACH: No, your Honor.

THE COURT: All right. I now proceed to discuss and indicate the tentative decision with respect to the third issue, the alleged inadequacy of the EIS. We assume here, arguendo, that an EIS was required as a matter of law.

To properly approach the question of the adequacy of this EIS, one must start with a discussion of the scope of judicial review of an EIS and the standards for judicial review as they exist in this circuit. Then one must consider whether and to what extent a claim of inadequacy, a particular claim, raises a disputed issue of material fact.

The Ninth Circuit has made it clear in Latham v. Brinegar, 506 F.2d 677, that the question of whether an EIS complies with the requirements of NEPA as a procedural matter is governed by Section 706 (2)(D) of the APA, the Administrative Procedure Act.

How does one determine whether an EIS meets that standard? Again, our circuit has given us good guidance in Trout Unlimited v. Morton, 509 F.2d 1276. The circuit amplified the rule of reason standard in this way: They said that an EIS is to be deemed in compliance with NEPA when its form, its content and its preparation substantially accomplished two things: First, it provided the decision makers with a sufficiently detailed environmental disclosure to aid in the substantive decision of whether to proceed or not with the project in light of

its environmental consequences; and second, it made available to the public information of the project's environmental impact and encouraged public participation in the development of that information.

It is, I believe, undebatable that a reviewing court's function is not to second guess the administrative agency on the question of whether the public interest would be well or poorly served by the project. The court should not stop the project even if it feels that the agency has blundered in its decision to undertake the project. That was stated by our circuit in the recent Matsumoto case.

As the Second Circuit forcefully said in County of Suffolk, the reviewing court is no super agency empowered to substitute its scientific expertise for

the evidence received and considered by the agency. County of Suffolk enunciates that the court's job is to determine if the EIS was compiled in objective good faith and to determine whether the resulting statement would permit the decision-maker to fully consider and balance the environmental factors. The court, said this Second Circuit opinion, is to determine if the authors made an objectively adequate effort judged in the light of the rule of reason to compile and present all of the significant environmental factors and alternatives.

On the matter of summary judgment now, where adequacy is challenged, it is now clear in this circuit that a summary judgment may well be appropriate despite the existence of affidavits from scientists and others buttressing a claim by plaintiffs of inadequate consideration

by the framers of the study of various things.

The case that validates summary judgment in such a situation is Friends of the Earth v. Coleman, decided in 1975, at 513 F.2d 295.

As Judge Wright explains in that opinion, there is no genuine issue for trial unless the plaintiff is asserting versions of the facts which, if true, would enunciate a legal theory that would remain viable and entitle the plaintiff to judgment as a matter of law.

The case stands for the proposition that where plaintiff is claiming inadequacy, it is not enough to show that experts may differ or that every possible alternative was not considered. Even if both of those are true, there would not be created an issue of material fact when one keeps in mind the proper scope of judicial review.

As I told you, I came to the tentative conclusion that under the teachings of Friends of the Earth this summary judgment should be granted on this alternative ground, namely, that no bona fide issue of material fact has been tendered that would permit the Court to determine if this EIS may have been inadequate; or, conversely, that no such issue has been tendered as to which an affirmative finding for the plaintiffs would make the EIS inadequate.

Plaintiffs spend most of their time under this heading in attacking the use of the CNEL noise measurement technique or standard. Their claim that other possible standards were ignored by the framers of the study is factually wrong. The EIS on its face shows that the existence of other standards was known and noted.

The choice of the CNEL is not shown to have been so unreasonable as to make this EIS inadequate even if one takes at face value the affidavits on the subject submitted by plaintiffs. At most, if all of those affidavits are deemed true, they establish a disagreement among experts.

In looking at this matter of the CNEL one might come to the conclusion that the CNEL standard which has been adopted by the state legislature of California as the standard that must be met under the state's police power so as to impose no more annoyance and harm to the citizenry as is absolutely required for running airports, that such a standard would be presumptively and perhaps even per se a reasonable standard to be adopted in an EIS. Now, whether it is per se reasonable as a matter of law merely because the state has adopted it, I don't have

to decide. But I do decide that its use is reasonable and permissible; and the claim made that its use was improper does not raise a bona fide issue of material fact that would establish, if plaintiffs' version is correct, the inadequacy of the report.

I note in this connection that there are federal regulations developed by the FAA for the contents of an EIS involving airports. They have been cited to me by the defendants. I won't swear to the citation, but my note is that the citation is 42 Federal Register 32630. But those regulations explicitly authorize the use of the CNEL in such EIS situations. And this EIS obviously meets those FAA standards not only with respect to the CNEL but in other respects, as well. And plaintiffs do not dispute that in their papers so far as I can see.

I am not going to take time to discuss in detail, and perhaps not at all, most or all of the inadequacy claims asserted by plaintiffs. I have analyzed all of them. At most, they fall under the category of a scientific dispute among experts. Moreover, many of the things that plaintiffs say are not discussed in the EIS are in fact adverted to in it.

I will discuss briefly plaintiffs claim of so-called newly-discovered evidence dealing with the risk of airport noise to unborn children. And I will discuss briefly plaintiffs' claim that the bond issue having to go to $24,000,000 instead of $12,000,000, as envisioned at the time of the EIS, makes the EIS inadequate.

As to the unborn children, even if this falls under the category of newly-

discovered evidence because of a new report coming out, we have a clear statement from the United States Supreme Court in the most recent authority in the whole environmental field that the courts have no business sending EIS's back because some new technological discovery or research has occurred in the meantime.

I am not going to take the time to quote that opinion, but the language on this subject is quite strong. The case, of course, is Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, decided last month, April 34d, and found at 46 Law Week 4301.

The entire tone of that opinion is that the courts should govern themselves with much greater restraint in reviewing, second-guessing and possibly

sending back EIS's for correction at the cost of stopping projects that have been administratively validated after fair and reasonable inquiry.

The new material on unborn children that plaintiffs are talking about is in an article which plaintiffs have provided to me. It is nowhere near the kind of revolutionary unforeseen discovery that could even conceivably warrant stopping this project and sending back the EIS for consideration of the new material.

As to the $24,000,000 bond issue -- and defendants agree that it will have to go to that sum because of increased costs -- again, and also, I don't think that that could even conceivably warrant sending the EIS back for further consideration. I will have some more to say about that in a moment. It deals with the economic viability of the project.

On the issue of air pollution, that's another one I want to comment about briefly because plaintiffs devote a good deal of time and effort to it. It, in my view, again, involves only a dispute among scientific experts. The EIS shows a full and fair and reasonable consideration of the whole air pollution problem.

A lot of effort is given by plaintiffs' questioning the AVAP model used to gauge air pollution. It is at best for plaintiffs a dispute of experts. But there is probably not even a dispute among the experts as to this, because plaintiffs' expert, who submits an affidavit to me, testified at the state court trial that it was, the AVAP was accepted by the scientific community as the state of the art.

After advancing all of the numerous claims of what was not considered or

not adequately considered by the framers of this EIS, the plaintiffs make one argument which is not related to that. The plaintiffs now argue that I should hold the EIS inadequate, or at least give them a trial to prove its inadequacy because the EIS is not couched in language that the public could understand.

The Supreme Court dealt with that matter in the new case of Vermont Yankee. As in Vermont Yankee, there is in this case no evidence in the record of any lack of understanding or protest about complexity of verbiage, even though the record demonstrates that there were well-attended, large public hearings. In Vermont Yankee the Supreme Court seems to be saying that unless the agency is given some notice of this problem of technical verbiage so that

it can consider remanding the report for redrafting in more easily-understood language, it is too late to raise that question after the decision has been made.

Plaintiffs' claims on this issue are contained in an extremely well-written affidavit by Professor Lanham; but they do not, in my view, raise any bona fide dispute of material fact which would warrant trial on the question of readability.

I said I would discuss briefly the change in the amount of the bonds, and at the same time I discuss the other issues tendered by plaintiffs as to the project's fiscal feasibility. Even if plaintiffs' position is taken as totally correct, I do not regard these claims as invalidating the EIS and as raising any bona fide dispute of material fact.

Economic viability is not a required part of an EIS. Trout Unlimited stands for that proposition. And Judge Renfrew's opinion in Environmental Defense Fund, Inc. v. Armstrong, 352 F.Supp 50, stands for that proposition.

Environmental costs need to be considered and balanced against total benefits including economic benefits of the project. But plaintiffs would have us equate with that kind of balancing what they say is the foreordained economic failure of this airport under public operation, and that kind of economic forecasting simply has no place in an EIS.

The fact that these framers got a very preliminary economic feasibility statement from a national accounting firm was a decision of theirs that they made for their own purposes and it was

not a necessary part of an EIS.

Well, with apologies for its length, I have finished what I propose to say concerning my tentative decision of this part of the case on this issue. And before opening the matter to argument, I want to deal for a minute only with the AADA claim.

It is not at all clear that this acquisition involving the preservation of the status quo as to the operation of this airport comes under Section 1716. Section 1716(d)(1) ways that the Secretary of Transportation cannot approve an airport development project "involving the location of an airport, an airport runway, or a runway extension" unless the sponsoring agency certifies that there has been the opportunity for public hearings to consider the economic, social and environmental effects of the project and

its consistency with urban planning.

I doubt whether the project that we are dealing with here is one that meets the definition I have just quoted. But even if, arguendo, it does meet that definition, there is no dispute of material fact that would create any issue about whether the opportunity for public hearings was afforded. Without dispute it was afforded. And the claim that new public hearings are now needed because of the new developments that I have mentioned before, the new article about unborn children and the larger amount of bond, is answered, I believe, in Vermont Yankee. You don't need a new hearing every time there is something new in the technological or economic picture.

Well, again, I am prepared to allot equal time to both sides to discuss the tentative decision on this point.

Mr. Fadem, do you wish to be heard on this aspect of the matter?

MR. FADEM: No, your Honor. We desire to submit on the written papers.

THE COURT: What about the various defendants?

MR. PACH: The Hollywood-Burbank Airport Authority will submit it, your Honor.

MR. SIMON: So will Lockheed.

MR. CONNOR: Likewise for the State of California, Department of Transportation.

MS. HALBREICH: So will the federal defendants, your Honor.

THE COURT: Well then, the tentative decision of the Court in all respects will be the decision of the Court.

As counsel on both sides know, in a very few hours' time I have to leave for Guam, and I cannot get this judgment out,

I don't think -- I will make the effort -- before I leave. It if has to be done while at Guam, I will do it there and send it out from there.

I will prepare my own judgment. I propose in it merely to find the essentials, to wit, that there is no bona fide issue of material fact, and that the defendants are entitled to judgment as a matter of law.

My comments that I have made today are an attempt to explain the alternative grounds for so holding and I, therefore, would ask the prevailing parties, the defendants, to order a transcript, which I now order to be filed when it is produced; and which I also order shall accompany the record on appeal, if there is an appeal.

Would somebody on the defense side be willing to undertake that?

MR. PACH: Yes, your Honor. We will do that.

THE COURT: I would like to ask defendants if they see any need for a more comprehensive judgment than I have outlined?

MR. PACH: No, your Honor. Speaking for all the defendants, I am sure that is quite adequate.

THE COURT: Is this a judgment of the kind on which there should be set any bond on appeal? Or is the bond on appeal requirement confined to money judgments?

I haven't given any thought to that question at all, and perhaps you haven't either.

MR. PACH: I don't anticipate any, your Honor. I am trying to think in my own mind how it would be applicable.

THE COURT: My guess is that research would determine that setting any bond on

appeal would be improper since no money judgment has been awarded. But I raise the question with you because I won't have any chance to discuss it with anybody for the next five or six weeks.

I am going to assume that is the situation, and there will be nothing provided in this judgment about bond on appeal.

One more thing. It is not, of course, part of any judgment I have made. I have made this decision purely on the basis of the law as I understand it. But I want to hand to the clerk now for incorporation in the record an article by Los Angeles City Councilman Marvin Braude in the March 26, 1978 issue of the Los Angeles Times Opinion Section. This article is entitled "Will We Now Drown In Paper Pollution? It Is Raining Environmental Impact Reports."

Just as a personal aside, I think from a policy point of view that Mr. Braude correctly analyzes what is happening in the current scene.

I fervently hope this matter can be brought to a prompt conclusion without any unnecessary delay. And I therefore order that if there is an appeal, no extension of time be sought at any stage of the appeal. That goes for the designation of the record and the filing of each and every brief by both sides.

If there is nothing further that any counsel desires to say, I am prepared to adjourn.

MR. FADEM: Well, I just offer --

THE COURT: Why don't you come to the podium, please.

MR. FADEM: Yes, sir.

The last order of the Court, I have made no effort to investigate as to

whether it lies within the power of this Court to determine the conduct of matters before the higher court. But I do want to register our objection to what we think are the unwarranted implications of that article.

THE COURT: If there is nothing further, the court will stand adjourned.

MR. PACH: Thank you, your Honor.

MR. SIMON: Thank you, your Honor.

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APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BURBANK ANTI-NOISE GROUP, etc., et al., Plaintiffs-Appellants, vs. NEIL E. GOLDSCHMIDT,* etc., et al., Defendants-Appellees.	F I L E D JUL 14 1980 Richard H. Deane Clerk, U.S. Court of Appeals
THE STATE OF CALIFORNIA, acting by and through the Department of Transportation; LOCKHEED AIR TERMINAL, INC.; and HOLLYWOOD-BURBANK AIRPORT AUTHORITY, Intervenors-Defendants-Appellees.	No. 78-2629 OPINION

* We substitute the name Neil E. Goldschmidt, the successor to the original defendant Brock Adams as Secretary of Transportation, per Fed. R. App. P. 43.

Appeal from the United States District Court For the Central District of California

Before: KILKENNY and CHOY, Circuit Judges, and EAST,** District Judge

PER CURIAM:

Appellants Burbank Anti-Noise Group, et al., appeal the adverse summary judgment entered by the District Court on May 8, 1978, involving an interpretation of the National Environmental Policy Act (NEPA) as it applies to an agreement for the purchase of the Hollywood-Burbank Airport (Airport), owned by the Lockheed Air Terminal, Inc. (Lockheed), by the Hollywood-Burbank Airport Authority (Authority) with the aid of federal financial assistance to the Authority

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** Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

with the aid of federal financial assistance to the Authority from the Federal Aviation Administration (FAA).

Mootness Issue:

During the course of the oral argument, the appellees raised the issue of mootness of the appeal, thereby questioning this Court's jurisdiction. E.g., Preiser v. Newkirk, 422 U.S. 395, 401-02 (1975); Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Missouri, 361 U.S. 363, 367 (1960); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1221 (9th Cir. 1971).

The parties were granted additional time to brief the issue which we first address. The appellees contend that the case is moot because the federal funds have already been distributed and title to the Airport transferred, and note that

appellants did not seek an injunction pending appeal. They urge us to follow Friends of the Earth, Inc. v. Bergland, 576 F.2d 1377, 1379 (9th Cir. 1978), in which this Court held:

> "Where the activities sought to be enjoined have already occurred, and the appellate courts cannot undo what has already been done, the action is moot. In Matter of Combined Metals Reduction Co., 557 F.2d 179 (9th Cir. 1977). This is especially so where, as here, no stay on appeal has been sought. Id. at 189."

Friends of the Earth does not govern this case, however, because the actions here can be undone. Unlike Combined Metals Reduction Co., all parties to the transactions are before the Court. If appellants were to prevail on the merits of this appeal, this Court could remand with instructions to the District Court to order a transfer of the Airport title back to Lockheed and a return of the

money to the FAA. See Gonzales v. Costle, 463 F.Supp. 335, 338 (N.D. Cal. 1978). Nothing has transpired that has deprived this Court of the power to affect the rights of the litigants in this case. Rosenfeld, 444 F.2d at 1221. The issues on appeal are not moot.

On the Merits.

We agree with the District Court that NEPA did not require the FAA to prepare an environmental impact statement (EIS) concerning federal financial assistance for the Airport acquisition. Because we hold that no EIS was necessary, we need not consider whether the EIS actually prepared by the FAA was adequate nor whether this suit is barred by collateral estoppel.

NEPA requires federal agencies to prepare an EIS for all "major Federal actions significantly affecting the

quality of the human environment." 42 U.S.C. § 4332(2)(C).

> "An EIS must be prepared if 'substantial questions are raised as to whether a project . . . "may cause significant degradation of some human environmental factor."' City of Davis v. Coleman, 521 F.2d 661, 673 (9th Cir. 1975), quoting Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 (5th Cir. 1973)." City & County of San Francisco v. United States, 615 F.2d 498, 500 (9th Cir. 1980).

An EIS is not required, however, when the proposed federal action will effect no change in the status quo. Committee for Auto Responsibility v. Solomon, 603 F.2d 992, 1001-03 (D.C. Cir. 1979). An EIS need not discuss the environmental effects of mere continued operation of a facility. Westside Property Owners v. Schlesinger, 597 F.2d 1214, 1217-18 (9th Cir. 1979). In Borough of Fairfield v. Coleman, 8 ERC 1518, 1521 (D.C. N.J.

1975), aff'd without opinion, 532 F.2d 745 (3d Cir. 1976), a case almost identical to this one, the Court held "as a matter of law that no Environmental Impact Statement is required for the act of financing the acquisition of an existing airport." The following language is clearly analogous to the present case:

> "The only aim here is the preservation of the status quo. No further development is encompassed within the framework of the Grant Agreement sub judice. In fact, as the defendants point out, any further development of the airport without first amending and altering the existing Airport Layout Plan is precluded under 14 C.F.R. § 152.5(a)." Id.

A similar result was reached in the recent case of City & County of San Francisco v. United States, 615 F.2d 498 (9th Cir. 1980). In that case, this

Court held that no EIS was required for the Navy to lease its shipyard to a private ship repair company, despite a two year period of inactivity prior to the transfer. No modifications were allowed that would interfere with the Navy's reuse at some time in the future. The Court stated:

> "It was not unreasonable to regard the leasing of the yard as a phase in an essentially continuous activity. In these circumstances the Navy was not required to evaluate the environmental consequences of the lease as if the Navy were proposing to establish this multi-million dollar industrial complex for the first time." 615 F.2d at 501.

Although adverse impact was acknowledged from reactivation of the shipyard, the Court held that the agency had reasonably concluded that the lease would not result in significant deterioration of the environment. The conclusion that no EIS

is required is certainly compelled in the present case since the evidence of record and applicable law show that there will be no deterioration from the current state of the environment.[1/]

1/ California Government Code Section 6546.1, which authorized the creation of the Hollywood-Burbank Airport Authority provides:

> "In operating the airport, the separate public entity above mentioned shall not permit or authorize any activity in conjunction with the airport which results in an increase of the size of the noise impact area based on a community noise equivalent level of 70 decibels as established pursuant to Title 21, California Administrative Code, Chapter 2.5, Subchapter 6, and shall further comply with the future community noise equivalent levels prescribed by such title as it now exists or is hereafter amended.
>
> "The separate public entity shall not authorize or permit the lengthening of runways defined herein as the paved portions of the runways presently on airport property, or the purchase of fee title to condemned real property zoned for residential use as of the effective date of this statute."

(continued)

This case simply does not present the type of situation NEPA was intended to address.

> "To compel [the agency] to formulate an EIS under these circumstances would trivialize NEPA's EIS requirement and diminish its utility in providing useful environmental analysis for major federal actions that truly affect the environment." Committee for Auto Responsibility, 603 F.2d at 1003.

The summary judgment of the District Court is AFFIRMED.

1/ (Continued)

Burbank City Council Resolution 17390 prohibits capital improvements if they would increase existing noise levels. The joint powers agreement of the Cities of Burbank, Glendale, and Pasadena for the formation of the Authority and the grant agreement with the FAA similarly preclude any increase in noice levels.

APPENDIX D

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

BURBANK ANTI-NOISE GROUP, etc., et al., Appellants, v. BROCK ADAMS, etc., et al., Appellees. THE STATE OF CALIFORNIA, acting by and through the Department of Transportation; LOCKHEED AIR TERMINAL, INC.; and HOLLYWOOD-BURBANK AIRPORT AUTHORITY, Intervenors and Appellees.	F I L E D SEP 8 1980 Richard H. Deane Clerk, U.S. Court of Appeals NO. 78-2629 ORDER

Appeal from the United States District Court, Central District of California

Before: KILKENNY and CHOY, Circuit Judges, and EAST, District Judge.*

* The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. FRAP 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

APPENDIX E

STATUTES AND REGULATIONS

FAA, Policies and Procedures for Considering Environmental Impacts, Appendix 2, § 3:

> "3. Environmental impact statements . . . Environmental assessments should be developed along with economic and technical considerations in the facility siting and design. Careful consideration of the specific site and the effect of aircraft operations should never be overlooked. Where the individual location impact or the operational use of the facility indicates significant environmental impact or where significant controversy exists or is expected, an EIS should be prepared and circulated in accordance with this order."

49 U.S.C. § 1916(c)(4):

> "(4) It is declared to be national policy that airport development projects authorized pursuant to this subchapter shall provide for the protection and enhancement of the natural resources and the quality of environment of the Nation. In implementing this policy, the Secretary shall consult with the Secretary of

the Interior and the Administrator of the Environmental Protection Agency with regard to the effect that any project involving airport location, a major runway extension, or runway location may have on natural resources including, but not limited to, fish and wildlife, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment, and shall authorize so such project found to have adverse effect unless the Secretary shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect."

42 U.S.C. § 4332:

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall —

* * *

(c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

No. 80-938

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

BURBANK ANTI-NOISE GROUP, NORTH HOLLYWOOD HOMEOWNERS' ASSN., SHERMAN OAKS HOMEOWNERS' ASSN., STUDIO CITY HOMEOWNERS' ASSN., SUN VALLEY HOMEOWNERS' ASSN., and VAN NUYS HOMEOWNERS' ASSN.,
Petitioners,

vs.

NEIL E. GOLDSCHMIDT, FEDERAL AVIATION ADMINISTRATION, LANGHORNE M. BOND, STATE OF CALIFORNIA, LOCKHEED AIR TERMINAL, INC., and HOLLYWOOD-BURBANK AIRPORT AUTHORITY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION
to
Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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QUESTION PRESENTED

In the Respondents' view only one issue is presented by the Petition, namely, may a court determine that the National Environmental Policy Act (42 U.S.C. § 4321, *et. seq.*) does not require the preparation of an Environmental Impact Statement for the acquisition of an existing, operating airport, where the purpose of the acquisition is the preservation of the *status quo*.

The following subsidiary issues would arise in the event of review in this matter:

1. Whether the District Court properly granted summary judgment on the alternative basis that an Environmental Impact Statement, which actually was prepared, complied with statutory requirements.

2. Whether final disposition by the California courts of identical issues arising under the California Environmental Quality Act, California *Public Resources Code* § 21100, *et. seq.*, bars the present action under the doctrine of collateral estoppel.

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No. 80-938

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

BURBANK ANTI-NOISE GROUP, NORTH HOLLYWOOD HOMEOWNERS' ASSN., SHERMAN OAKS HOMEOWNERS' ASSN., STUDIO CITY HOMEOWNERS' ASSN., SUN VALLEY HOMEOWNERS' ASSN., and VAN NUYS HOMEOWNERS' ASSN.,
Petitioners,

vs.

NEIL E. GOLDSCHMIDT, FEDERAL AVIATION ADMINISTRATION, LANGHORNE M. BOND, STATE OF CALIFORNIA, LOCKHEED AIR TERMINAL, INC., and HOLLYWOOD-BURBANK AIRPORT AUTHORITY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION
to
Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

The Respondents, Hollywood-Burbank Airport Authority, Lockheed Air Terminal, Inc., and State of California, acting by and through the Department of Transportation, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit's opinion in this case.

STATEMENT OF THE CASE

This matter comes to this Court upon the decisions of the United States District Court for the Central District of California and the Court of Appeals for the Ninth Circuit applying the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 *et seq.*). Both courts held that where a transfer of an existing and operating airport from private to public ownership does not involve expansion or change in the *status quo,* the federal agency involved is not required to prepare an Environmental Impact Statement (EIS).[1]

Petitioners' action was originally filed in the District Court on October 17, 1977. Plaintiffs, six homeowner associations, sought injunctive and declaratory relief against the federal Defendants, alleging a failure to prepare an adequate EIS under NEPA.[2]

The project for which Petitioners alleged an EIS was required involved the public acquisition, with partial federal funding, of the Hollywood-Burbank Airport from its prior owner, Lockheed Air Terminal, Inc. (LAT).

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[1]An extensive EIS was in fact prepared in this case and the determination of its adequacy formed an additional and alternative basis for judgment in favor of Respondents in the District Court. This issue was not discussed by the Ninth Circuit in view of its decision that, as a matter of law, no EIS was required by NEPA.

[2]The same Plaintiffs also filed a state case under the California Environmental Quality Act, California *Public Resources Code* § 21000 *et. seq.* After a lengthy trial the Superior Court in Los Angeles ruled that no Environmental Impact Report (EIR) was required under California law and, in any event, that the EIR that was prepared was adequate. *Burbank Anti-Noise Group v. City of Burbank,* (LASC Case No. C20743). An appeal from the superior court's decision has since been dismissed.

This acquisition was consummated on June 30, 1978, when the airport was acquired from LAT by the Hollywood-Burbank Airport Authority (HBAA) pursuant to California *Government Code* § 6456.1, specifically enacted by the Legislature to authorize the public acquisition of the Hollywood-Burbank Airport. For the past two and one-half years the airport has been owned and operated by HBAA, which is now known as the Burbank-Glendale-Pasadena Airport Authority.

On May 8, 1978, District Court Judge Irving Hill granted summary judgment in favor of all Defendants, holding that no EIS was required by NEPA and further holding that if an EIS was necessary under NEPA, the one which had been prepared was legally adequate. The court provided a thorough and well reasoned statement of its analysis, a copy of which is appended to the Petition herein as Exhibit "B".

The Ninth Circuit Court of Appeals affirmed, in a *per curiam* opinion filed on July 14, 1980, holding that under NEPA an EIS is not required where, as here, the proposed federal action would effect no change on the *status quo*.

NEPA and the substantial body of case law interpreting it fully support the holdings of both courts below. This case presents no unique, unsettled, or important issues of federal law. It is, accordingly, an inappropriate candidate for review by this Court.

REASONS FOR DENYING THE WRIT

I

THE PETITION FAILS TO SET FORTH ANY REASON, SUFFICIENT UNDER RULE 17, FOR THIS COURT TO GRANT A WRIT OF CERTIORARI TO REVIEW THE NINTH CIRCUIT'S PER CURIAM OPINION

Petitioners have failed to demonstrate any of the requisite grounds for granting certiorari (Rules, U.S.Sup.Ct., Rule 17). They have not identified any conflict in the decisions of the circuit courts. Nor have they been able to establish that the decision below involves important issues of federal law which should be settled by this Court. As will be shown, this case is but one more in a long line of cases holding that Congress meant exactly what it said when it limited NEPA to major federal actions ". . . significantly affecting the quality of the human environment. . . ." (42 U.S.C. § 4332(2)(C))

A. The Decision Below Is Consistent With a Uniform Body of Pre-Existing Case Law Which Establishes That an EIS Is Not Required for a Project That Has No Effect on the Status Quo

In the instant case, the Court of Appeals agreed with the conclusion of the District Court that NEPA does not require the preparation of an EIS where the federal government provides financial assistance for the acquisition of an existing and functioning public use airport, which will merely be continued in use as it was before the acquisition.

As stated by the Ninth Circuit below:

> "NEPA requires federal agencies to prepare an EIS for all 'major federal actions significantly affecting the quality of the human environment.' (42 U.S.C. § 4332(2)(C) . . . ."
>
> • • • •
>
> "An EIS is not required, however, when the proposed federal action will affect no change in the *status quo*. . . ."

Not surprisingly, Petitioners have failed to demonstrate any cases in conflict with this conclusion. In fact, the cases are uniformly consistent with it.

In *Borough of Fairfield v. Coleman*, 8 E.R.C. 1518 (D.C.N.J. 1975), *aff'd without opinion*, 532 F.2d 745 (3rd Cir. 1976), a case which presents remarkably similar factual and legal issues, the court held that as a matter of law, ". . . no environmental impact statement is required for the act of financing the acquisition of an existing airport." 8 E.R.C. at 1521.

The court granted summary judgment holding that "NEPA does not apply" where "the aim as here is simply to preserve an airport that is presently functioning, without altering it. . . ." 8 E.R.C. at 1521. Even more pertinent for the present case is the District Court's legal analysis:

> "Title 42 U.S.C. § 4332 requires the preparation of an Environmental Impact Statement for any '. . . major Federal action significantly affecting the quality of the human environment. . . .' The partial funding of the EIS in its effort to purchase (and thereby preserve for aviation use) the existing and functioning Caldwell-Wright Airport does not fall into this cate-

> gory of federal action. *The only aim here is the preservation of the status quo.* No further development is encompassed within the framework of the Grant Agreement *sub judice.*" 8 E.R.C. at 1521. (Emphasis added.)

To the same effect is the decision of the circuit court for the District of Columbia in *Committee for Auto Responsibility v. Solomon,* 603 F.2d 992 (D.C.Cir. 1979), *cert. denied, sub nom., Committee for Auto Responsibility v. Freeman,* 445 U.S. 915 (1980). This case involved a lease of the Great Plaza area of the Federal Triangle in Washington, D.C., for continued use as a parking facility. The court held:

> "The duty to prepare an EIS normally is triggered when there is a proposal to change the *status quo*. . . ."
>
> • • • •
>
> "To compel GSA to formulate an EIS under these circumstances would trivialize NEPA's EIS requirement and diminish its utility in providing useful environmental analysis for major federal actions that truly affect the environment. . . ." *Id.* at 1002-03.

Other cases have reached a similar result. See, *City and County of San Francisco v. United States,* 615 F.2d 498 (9th Cir. 1980), holding that no EIS was required for the lease of a navy shipyard to a private ship repair company; and *Westside Property Owners v. Schlesinger,* 597 F.2d 1214 (9th Cir. 1979), holding that an EIS need not discuss the overall existing environmental impacts associated with the continued operation of an airbase.

Thus, the decision below continues the unbroken line of cases holding that a federal agency need not prepare an

EIS where the project does not involve a change in the *status quo*.

B. The Court Properly Decided the Legal Issue of Whether an EIS Was Required by NEPA

Petitioners argue that procedurally the issue of the need for an EIS was not properly before the court below because no party filed a suit challenging the Federal Aviation Administration's (FAA) decision to do an EIS. Petitioners, however, acknowledge that this very question was raised by Respondents as an affirmative defense by answer to Petitioners' complaint in the District Court. (Petition, pp. 15-16.) The issue was therefore appropriately before both of the courts below. Indeed, it was identified as a "genuine issue of fact" by the Petitioners in the District Court; it was briefed and argued by parties; and, it properly formed the basis of the decision by the Ninth Circuit.

Moreover, Petitioners' procedural argument is obviously inappropriate to a Petition for Writ of Certiorari.

In a further attempt to divert attention away from settled case law, and to create an illusion of a conflict between the decision here and in other cases, Petitioners allude to numerous cases where the courts have declined to second-guess agency decisions *not* to prepare an EIS. Petitioners then argue that where, as here, an agency actually prepares an EIS, such a decision should not only be given similar deference, but that the courts actually *lack jurisdiction* to make a contrary determination. Such a proposition is not only without basis in the case law,

it is contrary to the very essence of the administrative process NEPA was designed to create.

It is not disputed that the FAA prepared an EIS. Nor can it be disputed that two federal courts and a state court concluded that the mere change of ownership of the airport *as a matter of law* did not trigger the need for environmental impact documents and that these decisions are consistent with all extant authority on the question. Petitioners in effect argue, however, that once FAA prepares an EIS, *for whatever reason*, the courts are precluded from considering the legal question of whether one was required under NEPA.

This startling conclusion is predicated solely upon cases articulating the standard of review applicable to administrative conclusions that NEPA does *not* require preparation of an EIS. (Petition, p. 11.) These cases are irrelevant to this action for at least two reasons.

First, it is a *non sequitur* to conclude, from these cases, that when a federal agency does prepare an EIS, the courts are barred from interpreting NEPA and concluding that an EIS was not required by that statute. The cases relied on by Petitioners deal only with standards of review, and not the power of the courts to exercise jurisdiction.

As the District Court below observed:

> "I am of the tentative view that the summary judgment ought to be granted on this ground, the ground that no EIS was required. One was, of course, obtained. I don't know whether it was obtained out of an abundance of caution because it arguably might be required, or because of someone's mistake of law. But

> whichever, it is my tentative view that obtaining an EIS does not, by estoppel or otherwise, foreclose a court from determining if one was required under the law, or precludes the defendants from arguing that none was required."

Second, the cases cited by Petitioners, dealing as they do with administrative decisions *not* to prepare an EIS, cannot even arguably be interpreted as establishing a standard of review in a case where an EIS was prepared. The two types of decisions are *fundamentally different.* One *necessarily* involves an administrative determination regarding applicability of the underlying statute. The other does not.

In short, a decision *not* to prepare an EIS *inherently* involves a determination of whether, under the facts of a particular case, measured against the legal standard contained in the pertinent statute, one is required. In such cases, courts have appropriately given deference, though not blind adherence, to the agency's conclusion on NEPA's inapplicability. But a contrary decision, *i.e.,* a decision to prepare an EIS, does not necessarily involve any such determination, *for such a decision can reflect many considerations other than legal requirement.* A federal agency may decide to prepare an EIS simply because of an independent desire for environmental analysis, whether legally required or not. On the other hand, the agency may be unsure of whether an EIS is required under NEPA and may thus desire to proceed on the side of caution. Additionally, a public agency may merely desire to accommodate demands of interested members of the public. These, and

countless other reasons, including those of a political nature, can motivate a decision to prepare an EIS—even though NEPA may be totally inapplicable to the situation involved.

Accordingly, the cases cited by Petitioners in support of their argument that the courts below should have deferred to FAA's decision to prepare an EIS are simply not applicable. Such cases are clearly not in conflict with the holding of the Ninth Circuit here. Moreover, the rule advocated by Petitioners would only discourage public agencies from voluntarily preparing environmental analyses for reasons of policy.[3]

II

PETITIONERS' BELATED "LOCATION APPROVAL" ARGUMENT ADDS NOTHING TO THEIR POSITION

Finally, in a collateral attack on the two opinions below, Petitioners argue that this case involved not only a feder-

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[3]Throughout their brief, Petitioners have strained to create the impression that FAA actually made a determination that NEPA required an EIS. Thus, Petitioners repeatedly assert that the FAA determined that "an EIS *was* required. . . ." In so doing, however, they are very careful to avoid specifying whether any such determination was premised on the agency's interpretation of NEPA or upon independent policy grounds. Actually, there is nothing in the Administrative Record indicating that FAA made a determination that an EIS was required by NEPA, or, for that matter, by any other provision of law. The record only reflects a decision to do one. Indeed, the only support Petitioners could even locate for use of the term "required" is the response to a leading question to a staff employee of FAA put in a deposition long after the administrative action had been taken and finalized. Such a question, even if otherwise probative, and not subject to evidentiary objection, could not alter the administrative action actually taken.

ally funded transfer of ownership, but also "location approval" of the airport. (Petition, p. 17.) This contention creates no issue sufficient under Rule 17 to warrant granting the writ and is, moreover, substantively meritless.

The airport acquired in this case was an existing and functioning facility at the time it was sold to HBAA. It was constructed in 1930 and has been in continuous operation from that time to the present. The act of approving the location of the facility had no more effect on the environment than the transfer of ownership. As applied to the instant situation, the concept of "location approval" did not in any way signify approval of the siting and construction of a new airport. It meant only that the location of the *existing* airport was approved for federal funding. Petitioners' argument is at most make-weight and adds nothing to the requirements of NEPA. There is no significant environmental effect identified in the "location approval" argument and there is no basis justifying the need for an EIS under this theory.[4]

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[4]Petitioners also rely on FAA's *Policies and Procedures for Considering Environmental Impacts*, Appendix 2, § 3, for their conclusion that the location approval of an airport requires an EIS. The section is cited out of context and has nothing to do with airport programs or airport location. It is part of Appendix 2 dealing with "Airway Facilities", such as FAA Air Route Traffic Control Centers, Air Route Surveillance Radars, Flight Service Stations, and various other FAA communication and navigation facilities. Moreover, the section quoted, on its face, is limited to "facility siting and design." In the instant situation, even if the section were otherwise relevant, it would not be applicable, because the Hollywood-Burbank Airport was established years ago, as was its design, and the present proposal involved no change whatever. In any event, petitioners have failed both here and below to cite any federal regulation which purports to expand the requirement for an EIS beyond that provided for in NEPA or which would require an EIS for the mere transfer of ownership of an airport.

Moreover, Petitioners failed to raise this issue in the District Court;[5] and, although it was raised before the Court of Appeals, that court affirmed without discussing the issue. Under such circumstances, it is customary for this Court to decline to consider such a legal claim. *National Labor Relations Board v. Sears Roebuck and Company*, 421 U.S. 132, 163-164 (1975); *Ramsey v. United Mineworkers of America*, 401 U.S. 302, 312 (1971).

III

ASSUMING ARGUENDO THE EXISTENCE OF CHANGED CONDITIONS, THE ADMINISTRATIVE RECORD MUST BE VIEWED IN LIGHT OF THE FACTS AS THEY EXISTED AT THAT TIME

Petitioners refer this Court to certain documents attached to their Petition for Rehearing below. They then assert that these documents show that noise levels have, in fact, increased since the determination made by the FAA in this case.

Despite the manifest incompetence of this evidentiary presentation, Respondents feel constrained to note they take issue with both the characterization and content of

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[5]Petitioners assert the contrary by arguing that much of their case below "addressed the impact of this airport's location on its neighbors. . . ." (Petition, p. 21). However, arguments directed *factually* to the noise impacts of an airport, and the adequacy of their discussion in the EIS, have nothing whatever to do with the *legal issue* of whether so-called "location approval", in and of itself, triggers the requirements of NEPA. Such a legal argument was simply not made in the District Court.

these documents. Substance apart, Petitioners' tardy attempt to introduce what amounts to multiple hearsay material, irrelevant to the factual issues resolved below, is improper at this stage in the litigation. If Petitioners believe that the airport is now being operated in violation of state law, or in violation of the federal Grant Agreements issued by the FAA, they must look to other remedies outside of this litigation. This case must be judged by the facts and circumstances as they existed at the time of the federal agency's action.

As this Court stated in *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc., et al.*, 435 U.S. 551 (1978):

> "We have also made it clear that the role of a court in reviewing the sufficiency of an agency's consideration of environmental factors is a limited one, limited both *by the time at which the decision was made* and by the statute mandating review." *Id.* at 555. (Emphasis added.)

This Court also quoted from *ICC v. Jersey City*, 322 U.S. 503 (1944) stating:

> "'Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed] . . . . If upon the coming down of the order litigation might demand rehearing as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in

an order that would not be subject to reopening.' . . ." *Id.* at 554-55.

Finally, Petitioners' reference to these matters, outside of the record,[6] hardly shows the existence of any important questions of federal law which would warrant consideration by this Court.

IV

REVIEW BY THIS COURT MUST ENTAIL RESOLUTION OF ADDITIONAL ISSUES

An additional reason why this Court should not grant the Writ of Certiorari is the fact that there are other grounds upon which this case may be decided without reaching the questions presented by the Petition. See, *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180 (1959). Those additional grounds were not dealt with by the court below, but were considered by the District Court.

A. The District Court Properly Granted Summary Judgment on the Additional Ground That the EIS Actually Prepared Fully Complied With Legal Requirements

The Administrative Record before the court below demonstrated that the documentation regarding the environmental impacts of the existing airport fully complied with the requirements imposed by NEPA. The EIS presented, *inter alia*, a wide range of scientific data and analyses including noise measurement studies and projections, as well as data on air pollution, traffic studies and a host of other subjects. As a matter of law, all procedural requirements of NEPA were fully met.

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[6]This Court has refused to consider material not in the record. *Lawn v. United States*, 355 U.S. 339, 354 (1958); *New Haven Inclusion Cases*, 399 U.S. 392, 450 n. 66 (1970).

The District Court, after a review of the EIS and all additional material submitted by the Petitioners below, concluded that there was no genuine issue of fact to be tried. As a matter of law, Petitioners' documents did not reveal the existence of any inadequacies in the EIS when measured in light of the statutory requirements as now interpreted by a large and settled body of case law.

Since this Petition can and should properly be disposed of on the basis that no EIS was necessary, Respondents believe that it would be inappropriate to burden the Court with lengthy legal arguments on this issue at this time. They were, of course, fully presented before the Ninth Circuit. This Court also has before it the well reasoned and thorough analysis by Judge Hill, which is set forth at pages 19-35, inclusive, of his decision. (Petition, Exhibit "B".) Respondents do, of course, reserve this alternative ground in support of the judgment. Moreover, as noted above, the very existence of this alternative ground also provides a persuasive reason why review should be denied.

B. Petitioners' Challenge to the FAA's Decision Approving Partial Funding of the Public Acquisition of the Hollywood-Burbank Airport Is Barred by the Doctrine of Collateral Estoppel

The present action is the analog of the earlier action filed in the Los Angeles County Superior Court, wherein Petitioners challenged the adequacy of the EIS, therein denominated an EIR, under the California Environmental Quality Act (CEQA), California *Public Resources Code* § 21000 *et seq.* The case came to trial in November of 1977

before Judge Ernest Zack. On December 28, 1977, at the conclusion of the Plaintiffs' case, during which substantial detailed expert testimony was heard, and voluminous documentary evidence taken, Judge Zack granted defendants' Motion for Judgment under California *Code of Civil Procedure* § 631.8. That judgment was founded upon findings of fact which are sufficient to dispose of the present action under the doctrine of collateral estoppel.

These findings provided, *inter alia,* that the project is for a transfer of ownership of an existing airport which does not contemplate any physical expansion of the airport or its terminal facilities.

The legal criteria for determining the validity of a plea of collateral estoppel is threefold:

1. There must be a final judgment on the merits; and,

2. The parties against whom the plea is asserted must be identical; and,

3. The issues decided in the prior adjudication must be identical to the ones presented in the subsequent action. *Blonder-Tongue Lab, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1971).

The Plaintiffs in the state case and this case are identical and the decision against Petitioners in that case has now become final under California law.

The basic requirements of NEPA and CEQA are the same. The California statute was modeled after the federal law. Courts have used federal and state cases construing these statutes interchangeably.

This was confirmed by the California Supreme Court in *No Oil, Inc. v. City of Los Angeles,* 13 Cal.3d 68 (1974):

> "[S]ince the California act was modeled on the federal statute, judicial and administrative interpretation of the latter enactment is persuasive authority in interpretating the California act." *Id.* at 86.

Federal courts have also recognized the identity of the two statutes. *City of Davis v. Coleman,* 521 F.2d 661 (9th Cir. 1975).

Thus, the District Court below was persuaded that collateral estoppel would be applicable if the state case was final under state law:

> "I say that a summary judgement would be proper if that decision was final because of the identity of the plaintiffs in the two cases and the identity of the legal questions involved." [R.T. p. 7].

Since such finality has occurred, it provides an alternative basis of support for the judgment and an additional ground for denying the writ.

CONCLUSION

It is respectfully submitted that the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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February, 1981

No. 80-938

In the Supreme Court of the United States

OCTOBER TERM, 1980

BURBANK ANTI-NOISE GROUP, ET AL., PETITIONERS

v.

ANDREW L. LEWIS, JR., SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BURBANK ANTI-NOISE GROUP, ET AL., PETITIONERS

v.

ANDREW L. LEWIS, JR., SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether the court of appeals' affirmance of the district court's judgment was correct where the district court had held, as to an environmental impact statement (EIS) prepared by the Federal Aviation Administration (FAA) concerning its decision to provide federal financing for the purchase of an existing commercial airport by local jurisdictions, that even assuming that the EIS was required by law, summary judgment should be entered in favor of the defendants because the EIS met all applicable requirements.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C) is reported at 623 F. 2d 115. The oral opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1980. A petition for rehearing was denied on September 8, 1980 (Pet. App. D). The petition for a writ of certiorari was filed on December 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Hollywood-Burbank Airport, located in Burbank, California, was established in 1930 as a privately owned commercial airport serving the greater Los Angeles metropolitan area. The Lockheed Corporation purchased the airport in 1940. By 1973, when Lockheed decided not to continue operating the facility, Hollywood-Burbank Airport was the only privately owned major commercial air terminal in the United States.

Upon learning of Lockheed's decision to cease operating the airport, the City of Burbank and other adjacent communities notified Lockheed of their interest in purchasing the airport and maintaining its use as a commercial air terminal. In 1973, pursuant to the Airport and Airway Development Act of 1970 (AADA), 49 U.S.C. 1701 *et seq.*, the Federal Aviation Administration (FAA) made a grant to Burbank to finance a portion of the cost of a master planning study to determine whether public acquisition of the airport would be feasible and whether the airport should continue to exist as a public air transportation facility. The ensuing master plan report, which was the subject of public hearings, indicated that public acquisition of the airport and its continued use as a terminal were feasible.

As work on the master plan report progressed, the FAA requested that an Environmental Impact Assessment Report (EIAR) be prepared before it considered an application for airport funding under AADA. At the same time, in accordance with the procedures and requirements of the California Environmental Quality Act, Cal. Pub. Res. Code § 21000 *et seq.* (West Cum. Supp. 1980), the Burbank City Council elected to prepare a draft Environmental Impact Report (Draft EIR) and a final Environmental Impact Report (Final EIR). In light of the similar state and federal environmental statutes, local government and federal officials made a policy determination that the most expeditious and economical course would be to prepare a combined EIAR/Draft EIR. A private environmental consulting firm was selected to oversee preparation of the combined EIAR/Draft EIR.

In September 1976, the State of California enacted legislation authorizing the creation of the Hollywood-Burbank Airport Authority (HBAA) and the issuance by it of revenue bonds to finance the airport acquisition. Cal. Gov't Code § 6545.1. That statute also provided in relevant part:

> In operating the airport, the separate public entity above mentioned shall not permit or authorize any activity in conjunction with the airport which results in an increase of the size of the noise impact area based on a community noise equivalent level of 70 decibels as established pursuant to Title [21], California Administrative Code, Chapter 9, Subchapter 6, and shall further comply with the future community noise equivalent levels prescribed by such title as it now exists or is hereafter amended.

The EIAR/Draft EIR was completed in early 1977. Shortly thereafter, the City of Burbank issued a public notice of the completion of the document and held a two-

day public hearing concerning the proposed airport acquisition. Following completion of the public hearings and circulation of the EIAR/Draft EIR at state, regional, and local levels, all comments collected were considered in the preparation of a revised EIAR/EIR by the FAA, the City of Burbank, and the private consulting firm. This document, together with oral and written comments received on the draft, became the final EIR and the draft environmental impact statement ("Draft EIS").

In June 1977, the City Councils of Burbank, Glendale, and Pasadena entered an agreement creating the HBAA. The agreement explicitly limited the authority of the HBAA so that it could not authorize any aircraft operations that would result in an increase in adverse noise effects above the present levels.

The FAA thereafter circulated the Draft EIS among federal, state, and local agencies and among interested persons. The FAA received comments on the Draft EIS, which it analyzed and considered. Following an evaluation, responses to the comments were prepared, and the comments and analyses were incorporated in a summary volume of the EIS. The summary volume, along with the Draft EIS, became the Final EIS.

After completing its evaluation, the FAA recommended to the Secretary of Transportation that federal financial assistance in the amount of approximately $35.5 million be provided to help the HBAA acquire the airport. The FAA recommendation stated that the proposed action included "airport location approval" pursuant to the AADA.[1] In

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[1]Section 16(c)(4) of the AADA, 49 U.S.C. 1716(c)(4), establishes a national policy that airport development projects authorized pursuant to the AADA shall provide for the protection and enhancement of the natural resources and the quality of the environment of the Nation. That provision requires the Secretary of Transportation to consult with the Secretaries of the Interior and Health and Human Services "with

addition, the FAA recommended, as a condition of the funding, that the HBAA agree to operate the airport in such a manner as to produce no increase in noise impacts. The Secretary approved the FAA's recommendation on October 4, 1977. On June 29, 1978, the HBAA purchased the airport from Lockheed with the aid of the FAA grant.

2. This action was filed in federal district court by six homeowners' associations against the FAA and other federal defendants on October 17, 1977.[2] Primarily, the plaintiffs alleged that the EIS that had been prepared regarding funding of the transfer of ownership of the airport did not comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq*. The State of California, the HBAA, and Lockheed each intervened in the action as defendants.

The district court entered summary judgment in favor of the defendants on May 9, 1978 (Pet. App. A-1 to A-2). In the accompanying oral opinion, the district court held, *inter alia*, that no EIS was required by NEPA because the use of the airport following the conveyance would be identical to

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regard to the effect that any project involving airport location, a major runway extension, or runway location may have on natural resources * * *." The Secretary may not authorize any project under the AADA found to have an adverse effect unless he first renders a written finding "that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect." Such a written finding was made by the Secretary concerning the project at issue.

[2]The plaintiffs had previously filed an action in state court challenging the adequacy of the EIR under the California Environmental Quality Act. *Burbank Anti-Noise Group, et al.* v. *City of Burbank, et al.*, No. C-207043 (Los Angeles Super. Ct.). In addition to the City of Burbank, the Cities of Glendale and Pasadena and the HBAA were named as defendants. The State of California and Lockheed intervened as defendants. The state court granted judgment in favor of the defendants on December 28, 1977, finding that no EIR need have been prepared and, alternatively, that the EIR which had been prepared was adequate. The plaintiffs' appeal from that decision was dismissed.

its prior use; hence, the transfer in ownership would have no significant environmental impacts (Pet. App. B-8 to B-17). In the alternative, the district court held that the EIS filed by the FAA was adequate, assuming that one was required by NEPA (Pet. App. B-18 to B-35).

The court of appeals affirmed on July 14, 1980 (Pet. App. C-1 to C-10). The court of appeals held, among other things, that NEPA does not require a federal agency to file an EIS when the proposed federal action will effect no change in the status quo. The court of appeals did not reach the district court's alternative holding that the EIS was adequate, assuming that one was required by law.

ARGUMENT

As noted above, the FAA in fact prepared an EIS in connection with the funding of the Hollywood-Burbank Airport. Whether or not the court of appeals was correct in holding that the FAA was not required by NEPA to do so, its judgment upholding the district court's grant of summary judgment in favor of defendants is correct and presents no conflict with any decision of this Court or of another court of appeals. Accordingly the decision does not warrant review by this Court.

The final EIS filed by the FAA fully complies with the requirements of NEPA, as the district court found (Pet. App. B-19 to B-34). The preparation of the Final EIS satisfied all procedural requirements of NEPA and it fully discusses the environmental issues associated with the airport's operations, including the noise impacts on the surrounding communities. Much of petitioners' argument in the district court was devoted to their contention that the EIS had employed an invalid methodology for measuring noise impact; but as the district court found (*id.* at B-25), petitioners demonstrated only that there was a disagree-

ment among experts over which methodology was the best.[3] Evidence of a disagreement among experts, however, does not warrant invalidating an EIS. *Environmental Defense Fund, Inc.* v. *Hoffman*, 566 F. 2d 1060, 1069-1070 (8th Cir. 1977); *Cady* v. *Morton*, 527 F. 2d 786, 796 (9th Cir. 1975). As the Second Circuit stated in *County of Suffolk* v. *Secretary of the Interior*, 562 F. 2d 1368, 1383 (1977), cert. denied, 434 U.S. 1064 (1978): "The district court does not sit as a super-agency empowered to substitute its scientific expertise or testimony presented to it *de novo* for the evidence received and considered by the agency which prepared the EIS."

Petitioners also assert (Pet. 8) that the Final EIS is a partisan rationalization of a mind made up in advance. However, while the agency which prepares the EIS must act in good faith, it need not be subjectively impartial, and a party charging bad faith must establish its allegations by the record. *Carolina Environmental Study Group* v. *United States*, 510 F. 2d 796, 801 (D.C. Cir. 1975); *Environmental Defense Fund, Inc.* v. *Corps of Engineers, U.S. Army*, 470 F. 2d 289, 295-296 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973). Petitioners failed to substantiate their charge that the FAA failed to give objective consideration to the

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[3]As petitioners note (Pet. 23-25), they sought to introduce additional evidence on the factual question of noise impact at the rehearing stage in the court of appeals. Petitioners cite this in connection with their contention that the court of appeals improperly found that there had been no major federal action with significant impact on the environment. We note here that whatever the validity of this evidence (the characterization by a congressman of the significance of certain FAA data for periods following the preparation of the Final EIS), it is irrelevant to the question whether the EIS was adequate, since the EIS must be judged in light of the circumstances existing at the time it was prepared. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978). In any event, such a fact-bound question is not appropriate for review by this Court.

relevant environmental considerations. Indeed, petitioners apparently agree that the Final EIS fully discloses the environmental effects of the airport operations, for they state (Pet. 18): "What the Secretary did—based on the EIS—was to approve the location of an airport *which has the environmental impacts shown by the EIS*" (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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